Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

ROBERT F. STEPHENS, ESQ.
Attorney General

MARK F. ARMSTRONG, ESQ.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Member, Bar of the Supreme Court of the United States
Counsel for Respondent

June 25, 1979

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

COUNTERSTATEMENT OF THE CASE

On September 12, 1977, the Grand Jury of Hart Circuit Court charged Kevin Nickols, the petitioner here, with the murder of Mattie Nickols on April 17, 1977 (Transcript of Record 3 [hereinafter cited as "TR"]). Trial was held on September 27, 1977 (Transcript of Evidence 1 [hereinafter cited as "TE"]) in the course of which the following testimony was heard.

Kevin Nickols was one of Mattie Nickols grandchildren (TE 248). On April 17, 1977, Kevin left his mother's house where he resided (TE 248) at 7:35 or 7:40 in the morning and went to his grandmother's (TE 249). He slipped the catch on the porch door

(TE 249) and knocked on the kitchen door (TE 250). He stayed for about twenty-five minutes (TE 250).

He came to feed the cats and obtain some potatoes stored in the cellar (TE 252). He used a flashlight in the cellar (TE 252). According to Kevin, he then returned home and waited for the Sunday paper to arrive but then decided at 8:40 or 8:45 to visit his girlfriend at Canmer, Kentucky (TE 254). She was not at home so Kevin returned to Munfordville (TE 255). On the way back, Kevin lost control of his car (TE 257). It left the road, went through a fence and landed in a field (TE 257-258). Despite his efforts to get his car moving again (TE 259), Kevin was unsuccessful (TE 260). The owner of the farm notified the police (TE 260) who arrived shortly thereafter (TE 261).

Raymond Overstreet, a Kentucky State Policeman (TE 234), investigated the homicide of Mattie Nickols (TE 236). At about 10:40 a.m., he was informed about Kevin's accident (TE 236). When he arrived at the scene of the accident, he observed that Kevin was in an apparent state of intoxication (TE 238). Trooper Overstreet informed Kevin that his grandmother "had been found dead" (TE 239), to which Kevin replied, ". . . [H]e had heard that she had been killed" (TE 239).

Earlier that morning, at 9:30 a.m., Clint Nickols, appellant's brother, went to Mattie's home (TE 39-40). When he looked in the porch door, he saw his grandmother lying on the floor (TE 41). He saw a .22 caliber rifle and a toy ball bat (TE 43). The bedroom had been ransacked (TE 43). The rifle belonged to Clint and

Kevin (TE 43). It was in its usual location (TE 44). Clint called for an ambulance (TE 42).

Raymond "Bucky" Day and Derek Bowman received the ambulance call at about 9:30 a.m. (TE 51). Day examined Mattie and found her dead (TE 51). He called the police (TE 51). Detective Bill Dodson of the Kentucky State Police responded to the call (TE 56). He arrived at Mattie's at about 10:30 a.m. (TE 56).

He saw Mattie's body on the porch (TE 56-57). In her hand was a paper towel (TE 57-58). By her side was a walking stick (TE 57). It appeared to Detective Dodson that Mattie had been beaten about the head and she had walked about the house leaving a trail of blood (TE 58). There was blood all over the house (TE 45). Only the bedroom in which her purses were kept was ransacked and the rest of the house was in order (TE 58-59). Detective Dodson also saw a sack of potatoes and a flashlight on the porch (TE 60). The bat and flashlight appeared to have blood on them (TE 60). The rifle, several spent casings, several live rounds, several slugs, the flashlight, toy bat, and pieces of screen were taken into custody (TE 60-66). Dodson was unable to find any fingerprints of value (TE 89-96).

Detective Dodson took a statement from Kevin (TE 68). In this statement, Kevin repeated that at about 8:00 a.m. he had gone to Mattie's to pick up some potatoes and feed her cats (TE 69). Kevin was quite nervous during the interview (TE 70). Kevin could not remember if he brought the sack of potatoes home

with him (TE 71). Kevin admitted to needing $2,000 by Friday to pay a fine imposed on him (TE 74). Kevin said that Mattie refused to give him the money although she would always help Clint (TE 75).

William M. Carney, M.D., a pathologist, conducted an autopsy on Mattie (TE 130). He found that she had received multiple blows to the top of the head inflicted by a blunt instrument (TE 132). These blows resulted in multiple skull fractures (TE 133). He also found gunshot wounds to the head (TE 133) passing through the brain (TE 134) and body (TE 134-135). Death was caused by the gunshot wound to the head (TE 138) and occurred at 8:00 a.m. (TE 139).

Glenn Baxter, a firearms examiner, testified that the fatal bullets were fired from the .22 caliber rifle (TE 182-183). He also stated that the bullets were fired through a wire mesh, but he could not positively state that it had gone through the wire screen on the porch door (TE 185).

At the close of the Commonwealth's case, petitioner testified. The jury was instructed (TR 13-14). It found Kevin guilty of murder and fixed his punishment at 20 years imprisonment (TE 395). Judgment of conviction and sentence was imposed upon petitioner (TR 23-24) and an appeal was taken (TR 25). The judgment of conviction and sentence was affirmed by the Supreme Court of Kentucky in an unreported case styled, *Nickols* v. *Commonwealth,* No. 78-SC-38-MR (Ky. Sup. Ct., Oct. 31, 1978). A Petition for Rehearing was filed and denied on February 27, 1979. A Petition for Certiorari has been filed.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. The Issues Presented Are Not Sufficiently Important to Warrant This Court's Attention.

A. The Difference in Wording Between the Instruction Given and the Instruction Requested Is Insignificant.

The trial court instructed the jury to find the petitioner guilty if, and only if, ". . . you [the jury] *believe* from the evidence beyond a reasonable doubt all of the following . . . [elements of the crime of murder]." Petition, at 6. (Emphasis supplied.) The petitioner's first argument is that it was constitutional error to use the word, "believe":

> "Mr. Williams: '. . . The meaning of these instructions here do not embrace the instruction that the defendant moves be given. There's a big difference between the jury 'believing him guilty' and believing the 'Commonwealth has proven him guilty'—a mighty big difference.'" Petition, at 7.

The difference of which the petitioner speaks becomes extinguished when the word, "believe," is read in context; *i.e.,* that the jury believe *from the evidence.* Accordingly, it is unlikely that the jury was mislead into a misunderstanding that a finding of guilty could be had upon unfounded belief rather than evidence.

Petitioner's reference to the amendment of Kentucky Rule of Criminal Procedure 9.56, see Petition, at 9, and its requirements *vis-a-vis* the wording of instructions raises only a question of State law.

B. The Use of the Phrase, "If, And Only If," Does Not Shift the Burden of Proof.

The Trial court instructed the jury to:

> ". . . [F]ind the Defendant guilty if, and only if you believe from the evidence beyond a reasonable doubt all of the following . . . [elements of the crime]." Petition, at 6.

The Petitioner suggests that the phrase, "if, and only if," adroitly shifts the burden of proof to the defendant, Petition, at 11-12. The phrase emphasized the burden of the Commonwealth to prove guilt beyond a reasonable doubt. If this shifts the burden, the shift is done so very adroitly that it is beyond this counsel's understanding.

C. Proof of Petitioner's Traffic Mishaps and His Mental Condition Was a Part of the *Res Geste* of the Crime.

The petitioner alleges that the prosecution erroneously adduced evidence of other offenses to buttress its case. The offenses are set forth in Petition, at 5. Only a brief summary of the Commonwealth's case is necessary to demonstrate the admissibility of the evidence.

It was the Commonwealth's theory that petitioner went to his grandmother to obtain money. When she refused, he beat her. Blood in the house demonstrated that after the victim was beaten, she wandered around the house and attempted to make a phone call. The rifle which was used in the killing was frequently used by the petitioner and was returned to its usual position after being used. The evidence of petitioner's traffic

mishaps was used to demonstrate his location at various times so as to show his initial arrival, departure, and return to his grandmother's home.

CONCLUSION

This petition does not raise any substantial questions of federal law which merit review by this Court and should, therefore, be denied.

Respectfully submitted,

ROBERT F. STEPHENS, ESQ.
Attorney General

MARK F. ARMSTRONG, ESQ.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Member, Bar of the Supreme
Court of the United States
Counsel for Respondent

IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 78-1769

KEVIN NICKOLS - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, Mark F. Armstrong, Esq., counsel for respondent, hereby certify that the attached Memorandum in Opposition to Petition for Writ of Certiorari to the Supreme Court of Kentucky was served on petitioner by depositing three copies of the aforementioned document in the United States mail, first-class postage prepaid, on June 25, 1979, addressed to petitioner's counsel, Jon W. Goodman, Esq., Box 325, Munfordville, Kentucky 42765. This service constitutes service on all parties required to be served.

Mark F. Armstrong

MARK F. ARMSTRONG, ESQ.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Member, Bar of the Supreme
Court of the United States
Counsel For Respondent